IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1039 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KOLIYA @ ABHESINH BHATHIBHAI BARIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1039 of 2000

MR NN PRAJAPATI for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MS NANDINI JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 03/02/2003

ORAL JUDGEMENT

This is an appeal by the appellant above named, original accused in Sessions Case No. 27 of 2000, under

Section 374(2) of the Code of Criminal Procedure, 1973 (for short, "the Code"), challenging the judgment and conviction order dated 01/09/2000 recorded by the learned Additional Sessions Judge and Special Judge at Godhra in Sessions Case No. 27 of 2000 under which the learned Judge convicted the present appellant for offences punishable under Sections 363 and 376, IPC as well as for an offence punishable under Section 3(1)(12) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The learned Judge sentenced the appellant for an offence punishable under Section 363 IPC to suffer RI for one year. The appellant was directed to pay fine of Rupees Two Thousand and in default of payment of fine he was required to undergo further SI for fifteen days. At the same time for the offence punishable under section 376, the appellant was sentenced to suffer RI for five years and to pay a fine of Rupees Two Thousand and in default of payment of fine, he was directed to undergo furhter SI for fifteen days.

2. For the offence punishable under Section 3(1)(12) of the said Act, the appellant has been directed to suffer SI for one year and to pay fine of Rupees One Thousand. In default of payment of fine, the appellant has been required to suffer further SI for fifteen days. The substantive sentence has been ordered to be run concurrently.

3. The facts of the case of the prosecution may be briefly stated as follows:

The present appellant is a resident of village Nadarva, Shahera Taluka of Panchmahals District. It is alleged against the appellant that about two months before i.e on 01/12/99, the petitioner induced Champaben, aged about 13 years, being the daughter of informant Galiabhai Balubhai and took her away from the custody of her parents. That the appellant took her to various places like Vadodara, Ankleshwar and Nadiad. It is also alleged against him that the appellant committed rape on her and thereby committed the offences, punishable under Sections 363 and 376 of IPC. It was further alleged against the appellant that the appellant dominated on the wills of the said minor girl and committed rape on her and thereby committed offence punishable under Section 3(1)(12) of the said Act.

4. The father of the girl, Galiabhai Balubhai instituted the aforesaid FIR against the appellant stating that his daughter - Champaben was aged about 12 years and she used to go to school also. It is also the

case of the father that victim - Champaben used to go to Vav for doing labor work with the cousin of the father.

5. Thereafter, cousin, Kagdabhai Lalubhai had informed the father that the minor girl - Champaben was not there. Therefore, the father went to Vadodara for inquiry of his daughter. Inquires were made elsewhere also and then he came to know that the present appellant had took her away. Therefore, further inquiries were again made and ultimately FIR was filed by the father of the girl. On registration of the FIR, investigation was undertaken. The appellant was arrested. Statements of witnesses were recorded. Panchnamas were drawn. Muddamal articles were recovered. The victim was taken from the custody of the appellant and she was sent for her medical examination. At the close of the investigation chargesheet was filed against the appellant for the aforesaid offences. Since the offence punishable under Section 376 IPC was exclusively triable by the Court of Sessions, the learned Judicial Magistrate (First Class) at Devghad Baria committed the case to the Court of Sessions, where it was registered as Sessions Case No. 27 of 2000.

6. The learned Judge supplied copies of police investigation papers to the appellant. Charge was framed. It was read over and explained to the appellant. The appellant pleaded not guilty to the said charge. The learned Judge, thereafter, proceeded to record evidence against the appellant. At the close of evidence, further statement of the appellant was recorded under Section 313 of the said Code. Arguments were heard. Thereafter, the learned Judge found the appellant guilty for the aforesaid offences. After hearing the appellant on the quantum of punishment, the learned Judge inflicted the aforesaid punishment on the appellant.

7. Feeling aggrieved by the said judgment and conviction order, the appellant has preferred this appeal before this court. It has been contended here that the trial court has committed error in holding that the minor girl was only aged about 13 years. That the issue as to the consent of the minor girl has not been properly appreciated by the trial court. That there was no material before the trial court to show that the girl was below the age of 16. That the trial court has overlooked the evidence that the girl had consented to run away with the appellant and had also consented for her physical relations with the appellant. Therefore, the judgment and conviction order recorded by the trial court are illegal and erroneous and deserve to be set aside.

8. The appellant has therefore, prayed that the present appeal be allowed, the judgment and conviction order recorded by the trial court be set aside, the appellant be acquitted of the offence in question and he may be set at liberty forthwith. On receipt of the appeal, it was admitted, but bail was refused. Paper book was prepared and the matter was fixed for hearing. Mr.N N Prajapati learned advocate has appeared on behalf of the appellant and Ms. Nandini Joshi learned APP has appeared on behalf of State.

9. The learned advocate for the appellant has argued the matter at length that there was no material before the trial court to hold that the victim - Champaben was below the age of 16 at the time when the offence could be said to have been committed. If we go through the evidence on record, it is very clear that the prosecution has produced on record the School Leaving Certificate of the victim. According to the said certificate the date of birth of the appellant is 01/03/87. Since the offence was committed in December, 1999 it can be said that the victim could be little above 12 years of age at the time when the offence was committed.

10. Then we can turn to other material on record. PW-3, Galiabhai Balubhai, Ex. 9, is a witness who is the father of victim - Champaben. He has clearly stated on oath that Champaben was aged about 13 years. She was studying in the school. But, thereafter she had left the school and had started to do labour work. He has produced the school leaving certificate which is at Ex. 10, showing that the date of birth of the victim was 01/03/87.

11. If we go through the cross-examination of this witness, we find that only one question was put to him as to whether he remembered the date of birth of the minor But he didn't remember the said date when he tendered evidence. However, with respect to the age of Champaben no further cross-examination is found from the evidence of the witness. This would show that the evidence of this witness with respect to the age of the victim has not been seriously challenged during the cross-examination.

12. Then we can turn to the evidence of the FIR, Ex. 11, which also shows that the girl was below the age of 16. Champaben, Ex. 12, is a victim who has deposed before the Court that she was 13 years of age at the relevant point of time. Even during her

cross-examination, no serious challenge was required to be faced by her, with respect to her age stated by her at the beginning of her evidence.

13. Then we can turn to the evidence of the Medical Officer and the certificate issued by him. Dr.Chandrahas Keshrav, Ex. 23, has deposed that he has considered the aspect of age of the victim from different angles. On the one hand clinical examination was undertaken by him. Then the opinion of Dental Surgeon was also obtained. According to the said evidence, the age of the girl was below 18 years. Then he has further said that as per the report of X-Ray and Radiography, the age of the victim may be between 15 and 17 years. Therefore, the evidence of the witness relates to the opinion based on X-ray and Radiography, which has not been seriously challenged in cross-examination. Even the certificate issued by him also supports the said oral testimony of this witness. There is no other evidence as above to show that the girl could be above the age of 14 or 15 years. However, taking the cumulative effect of the evidence on record, it has to be held that the girl was really below the age of 16 years, at the time when the offence was committed.

14. It is true that the Doctor has deposed before the Court below that the girl could be between 15 and 17 years. But again, that is one of the aspects to be considered. At the same time, the birth certificate shows that she was below 13 years of age. Considering the cumulative effect of the evidence on record, it is to be accepted that the girl could not be above the age of 16. In other words, the girl was below the age of 16 as per the evidence on record. Once it is found that the girl was below the age of 16 at the time when the offence was committed, then in that case the consent, if any, given by her for having a physical relation with the appellant would be of no use.

15. Under Section 375 of IPC, A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercouse with a woman under circumstances falling under the said Section.

16. One of the requirements is that the said relation must be against the will and without the consent of the victim. This clearly shows that even if a physical relation has been entered into, with or without the consent of the victim, but, if the girl is below the age of 16 years, then the rape could be said to have been committed, despite the consent of such a girl.

17. This would clearly mean that even if consent was given by the girl, the offence could be said to have been committed by the appellant, as the girl was below the age of 16 years. Then there is the evidence of Chamapaben herself, referred to hereinabove. She has clearly stated that the appellant had physical relations with her after they had ran away and that they had moved from place to place. She has stated in her evidence that even before they run away from the place in question, they had physical relations for about 3 to 4 months. That means that even before the girl had attained the age of 16 years, the appellant had physical relations with her, which clearly shows that the appellant had committed rape on her and so the consent would be immaterial.

18. The fact is further supported by the medical evidence tendered by the Doctor and his certificate. It is also required to be considered that she had given a history of events to the Doctor and there also she has stated in so many words, about her physical relations with the appellant. Sameway, the appellant has also given the same history to the Doctor and has also admitted his physical relations with the girl in question. In above view of the matter, there is sufficient evidence on record, to show that the girl was below the age of 16 years, at the time of the commission of offence. In that view of the matter, the question of consent does not arise.

19. The girl - Champaben has clearly deposed before the trial court that she was taken to various places by the appellant and during the prolonged period, the appellant had physical relations with her. Since the girl was belfow the age of 16 at relevant point of time, an offence u/s. 363 IPC was committed by the appellant. There seems to be no serious cross-examination of victim and there is no reason to dis-believe her evidence. It is supported by the evidence of her parents and by circumstance that she was ultimately found with the appellant by the police.

20. Once the girl is proved to be belfow 16 years of age, it goes without saying that the prosecution has proved through the evidence of the girl as well as other evidence on records taht the girl was taken out by the appellant from the guardianship of her parents and that the appellant committed rape on her. Even the learned advocate for the appellant before this Court did not argue the factual aspect. His argument was restricted to the evidence on age of the girl only.

21. So, on the one hand, the girl was below the age of 16 and she was taken away by the appellant under an inducement that they would marry. The records do not show that he had married subsequently also. Then the evidence also shows that she was below the age of 16 and the appellant had dominated on her will and committed the said offence.

22. In view of the above position, the learned trial Judge was perfectly justified in holding the appellant guilty for the aforesaid offences. The learned advocate for the appellant has taken me through the evidence on record and through the reasons of the trial court during the course of judgment. However, he was unable to identify any infirmity from the judgment or from the evidence, no procedural defect has been cited.

23. Even, it has not been possible on the part of the learned advocate for the appellant to point out any infirmity in appreciation of the trial court, when the trial court has appreciated the evidence on record and when the findings have been recorded on sound reasons and when the reasons are based on evident materials on record, then in that case, it could not be said that the learned Judge has committed something wrong in convicting the appellant for the offence in question. In other words, the learned trial Judge has not committed any error in appreciation of evidence on record and therefore no interference is required at the appeal stage.

24. Learned advocate for the appellant has contended that looking to the consent aspect of the matter, the sentence inflicted by the trial court in respect of the aforesaid offence is on the higher side.

25. It is a fact that the victim has very clearly deposed in her evidence that it was a matter of her consent. She has also stated that she had physical relations with the appellant, even three to four months before she was taken by him. This aspect of the case makes it clear, that the appellant had past physical relations with the minor girl. It is true that technically this would not be treated to be a case for acquittal. But the facts may be treated to be a circumstance for reducing the quantum of punishment. It is required to be considered here that even subsequently when the girl was in the custody of the father she has not chosen to say that the appellant had committed forcible rape on her.

26. Anyway considering the totality of evidence on

record, I am of the view that the substantive sentence of five years can be reduced to four years in order to meet the ends of justice.

27. For the foregoing reasons, the appeal is partly allowed and the appellant is sentenced to suffer RI for four years instead of five years for the offence punishable under Section 376 IPC. He is directed to pay fine of Rupees Two thousand for the said offence and in default of payment of fine, he shall undergo further SI for fifteen days.

28. The conviction of the appellant for the offences punishable under Section 363 and 376 IPC and for offence punishable under Section 3(1)(12) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is hereby confirmed. The sentence awarded to the appellant for the offence punishable under Section 363 IPC and the offence punishable under Section 3(1)(12) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is also confirmed. The order of the trial court directing that the substantive sentence shall run concurrently, is also ordered to be confirmed. The appeal is partly allowed to the above extent.

(D. P. Buch, J.)

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